Maine Forest Service Interpretations of the Maine Forest Practices Act Statute and Rules (12 MRSA, § 8867-A - § 8888 & MFS Rules Chapter 20)

These interpretations take into account the full context, meaning, and intent of the Forest Practices Act, the associated MFS Rules, and the interpretations themselves, and must be used within that context.

1. If I only have one clearcut on a piece of property, do I need to have a separation zone?

   Answer: Yes, if your total statewide ownership is greater than 100 acres..

2. If the separation zone fails between two clearcuts of any category, do they combine (grow) and become a larger clearcut and a possible larger violation, or are they to be treated as two separate violations?

   Answer: The two clearcuts will be treated separately. The existing situation will be analyzed by enforcement staff to ascertain what specific violations have occurred, including consideration of any other environmental laws and rules involving such issues as riparian buffers, water quality, set-back etc..

3. When can a clearcut created under the old rules, be used for sz for a new clearcut?

   Answer: This answer has 2 parts, depending on the category of the clearcut. The old clearcut can be used for SZ for a Category 1 clearcut once it is stocked with at least 450 trees per acre (tpa) (with no holes greater than 5 acres). The old clearcut can be used for SZ for a Category 2 or 3 clearcut once it is stocked with at least 300 tpa (with no holes greater than 5 acres) that are 10 feet tall for softwood, and 20 feet tall for hardwood, or when the said harvest area is stocked with at least 450 trees per acre (tpa) (with no holes greater than 5 acres), and 10 years have elapsed since the cc was created.

4. How are stump sprouts to be counted?

   Answer: Each stem in a sprout clump will be counted as an individual tree, provided it is acceptable growing stock (ags).

5. Are Alder and Chokecherry ags?

   Answer: No, they are not considered to be trees that are generally capable of developing into merchantable products.

6. Is the edge of the separation zone (sz), the average drip line?

   Answer: Yes.

7. What is a Certified Wildlife Professional (CWP), and who are they?

Answer: The program for certification of wildlife biologists is a service provided by the Wildlife Society (a national society) for its members as well as nonmembers and the public, who may desire a peer review evaluation statement. Certification constitutes recognition by the Wildlife Society that, to the best of its knowledge, an applicant meets the minimum educational, experience, and ethical standards adopted by the Society for professional wildlife biologists. Certification does not constitute a guarantee that the applicant meets a certain standard of competence or possesses certain knowledge. A list of CWP's is available from the Wildlife Society. We will also accept certifications from IF&W regional Biologists as well - as long as such certifications are prepared on state time.

8. With regard to the Category 3 review and approval process, does the clock start when MFS receives and date stamps the notification and plan?

   Answer: Yes.

9. With regard to the 100 A exemption, does the 100 acres include all land or just forest land?

   Answer: All land.

10. If a landowner, during the 2 year life of a notification, decides to connect two notified category 2 clearcuts and make one category 3, does the landowner have to stop and start the category 3 process? Should the vehicle be a new notification or an amendment?

    Answer: Yes, and the vehicle should be an amendment to the existing notification.

11. Where there is designated agent and the rules call for landowner responsibility, who is ultimately responsible, landowner, designated agent, or both?

    Answer: The landowner will always be held ultimately responsible.

12. If a clearcut and its associated sz was created under the old rules, can any of that sz be used as shared sz for a new clearcut under the new rules?

    Answer: Yes, as long as the old sz remains intact until the old clearcut is no longer a clearcut under the old rules, the sz distance, but not the area, can be shared by the new clearcut.

13. With regard to the landowner signature requirement on the Forest Operations Notification, is there a conflict between MFS Rules Chapter 20, section 3,A,1.(exception) and 12 MRSA §8883, sub-§1, H-1?

The Rule says:

"Exception: A landowner with a licensed professional forester in his employ is exempt from the requirement for landowner signature, provided the landowner maintains with the Bureau a list of licensed professional foresters authorized to sign for the landowner."

The law says: "H-1. The signature of the landowner and the designated agent when a designated agent is listed in accordance with paragraph A. If the designated agent is a licensed professional forester who has a fiduciary responsibility to the landowner, the signature of the landowner is not required;"

If there is a conflict, which takes precedence, the rule or the law?

Answer: While we do not see that there is a clear conflict in this case, whenever there is a conflict between the a rule and a law, the law shall take precedence.

- The exception in the rule applies in the case of a landowner (usually large) who "employs" a Licensed Professional Forester (LPF), in other words would the IRS consider the LPF an employee? If this is the case, the LPF can sign as the landowner (as long as the LPF is on the list maintained by the landowner with the MFS), there need not be a Designated Agent named, and the landowner need not sign the notification.
- The language in the statute applies when the landowner's designated agent is a LPF who has a fiduciary responsibility to the landowner. This allows the LPF (for example a consultant) to sign as the designated agent without the landowner's signature. If that is the case, the landowner does not have to sign the notification.

14. Given the answer to (13), what is the meaning of the phrase "a licensed professional forester who has a fiduciary responsibility to the landowner?"

Answer: The term fiduciary is a very technical legal term which has several separate but related meanings depending on the way it is used. We have compiled several definitions from Black's Law Dictionary, to develop an interpretation for use in the FPA rules:

"Fiduciary. A person having a duty, created by his undertaking [contract or agreement], to act primarily for another's benefit in matters connected with such undertaking...[and] having duties involving good faith, trust, special confidence, and candor towards another."

"Fiduciary duty. A duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law (e.g., trustee, guardian)."

"Agency. Agency is the fiduciary relation which results ... between two persons, by agreement or otherwise, where one (the agent) may act on behalf of the other (the principal) and bind the principal by words and actions."

When a fiduciary relationship exists, the agent is governed by legal principles, including "full disclosure." Black's defines full disclosure as a "[t]erm used in variety of legal contexts, e.g. a fiduciary who participates in a transaction for his own benefit is required to fully reveal the details of such ..." The full disclosure principle also generally applies when a "conflict of interest" situation arises because a person with a fiduciary responsibility has a "private interest in, [or stands to] gain from," a fiduciary transaction or relationship.

Based on these legal definitions, we interpret the term "fiduciary" as used in the FPA statute to apply to LPF's as follows: A LPF represents the landowner and the landowners interests. The LPF owes a duty of trust and full disclosure to the landowner with regard to the harvesting operation. The same LPF may also represent the harvester or other purchaser of the timber, provided the LPF has fully disclosed all relationships to all parties he has a

fiduciary responsibility to, and does not use any relationship to benefit himself at the detriment of any of the parties.

In addition to the fiduciary language in the FPA statutes, LPF's are also governed by licensing board requirements, including the board's code of conduct for LPF *(02, Department of Professional and Financial Regulation; 333, Maine State Board of Licensure For Professional Foresters, Chapter 6 Ethics and Standards of Professional Conduct),* which requires LPF's to avoid conflicts of interest, or even the appearance of them, and if one is discovered, to promptly and fully disclose it to the employer, and take action immediately to resolve it.

15A. Question: If I am harvesting wood on my own land, do I need to file a Forest Operations Notification?

Answer: Yes, unless you are specifically exempted under the so-called "**small woodlot owner exemption**." This applies only to owners of small woodlots who personally harvest small amounts of wood (2 acres of clearcut or 5 acres of partial cut) from their woodlots on an annual basis. MFS interprets this section to apply only to harvesting on woodlots, not areas used or planned for conversion to residential areas or other development.

Justification: 12 MRSA §8883, sub-§5, as amended by the 121st Legislature, states in part:

"**5. Notification exemption.** The following activities are exempt from the notification requirement under this section:

...C. Harvesting performed by the landowner[1] within a 12-month period when the total area harvested on land owned by that landowner does not exceed:

(1) Two acres if the residual basal area of acceptable growing stock over 4 1/2 inches in diameter measured at 4 1/2 feet above the ground is less than 30 square feet basal area per acre; or

(2) Five acres if the residual basal area of acceptable growing stock over 4 1/2 inches in diameter measured at 4 1/2 feet above the ground is more than 30 square feet basal area per acre."

15B. Question: If I am a logger clearing house lots or road rights of way in a approved development, do I or the landowner(s) need to file a Forest Operations Notification?

Answer: Yes, unless you are specifically exempted by the so-called "**houselot exemption**." When the landowner resides on the lot and plans to clear a small amount of additional area, or cut a few trees related to the use of the land as a houselot, or in situations where there is no house but where the landowner possesses a building permit and plans to clear the lot for houselot purposes, a Forest Operations Notification is not required.

A logger clearing lots that he or she owns for the purpose of resale for development must file a Forest Operations Notification. A landowner conducting any harvesting prior to the sale of lots to other parties must file a Forest Operations Notification.

Justification: (MFS Rules Chapter 20, section 3) states in part:

"EXEMPTION FROM NOTIFICATION REQUIREMENT: The following types of timber harvests are exempt from the notification requirements of this section, even if the forest products harvested are sold commercially:

(1) Removal of single trees or small groups of trees from residential yards, roadsides, and similar urban or suburban settings where the tree removal occurs on an area two acres in size or less, and is conducted for the purposes of hazard tree removal, right of way and driveway clearance, and lot clearance for the construction of residential dwelling units. This exemption applies only to land on

[1] Underlined language is amendment approved by the 121st Legislature.

which a person resides, or for lot clearing operations for a landowner who possesses a building permit, or where such lot clearance does not exceed the necessary construction footprint."

16. If a public road separates a parcel, can a landowner create a 40 acre clearcut on one side of Rt. 27 and have a 40 acre separation zone on the other side of the road?

Answer: No. According to MFS Rules Chapter 20 section 2,A,35 (definition of a parcel) ".....Contiguous tracts completely separated by a public road or roadway are considered to be separate parcels under these rules." It is the intention of the law and the rules that the clearcut and the separation zone must be on the same parcel.

17. If you have two 70 acre clearcuts, separated by a separation zone 50 acres in size and each cc is surrounded by 250 feet of separation zone that makes the total separation 70 acres. Is that in conformity with the new rules which allow for sharing of a separation zone?

Answer: No. It is the intention of the statute and the rules that separation zone distances can be shared, but acres cannot. According to the FPA statute (12MRSA §8869 sub.sec. 2-A) "A clear-cut must be separated from any other clear-cut by at least 250 feet except where a property line is closer than 250 feet from the edge of the clear-cut. Unless an exemption is provided in rules adopted pursuant to section 8867-A, a separation zone must be equal to or greater than the area clear-cut." When determining the area needed for separation zones, landowners must provide an area equal to the collective size of the clearcuts. In this case the sz would need to be 140 acres, with no less than 250' between them. It would of course need to meet the rest of the separation zone standards as well.

18. After Oct. 1, how will I know if a harvest is under the old rules or the new rules?

Answer: If a harvest operation is notified and started on October 1, 1999 or later, it will be subject to the new rules. Otherwise it is subject to the old rules. In an enforcement action, the MFS will use any evidence it can find to ascertain the actual start date.

19. Can trees less than 4.5" that are not AGS be used towards the total of 60 sq. ft. required in separation zones between Category 2 or Category 3 clearcuts?

Answer: Yes, As long as they are 1.0 " dbh or larger and as long as there is at least 40 sq. feet of BA in AGS and 40 sq. feet of BA in trees 4.5 " dbh or larger.

20. If a landowner has a 300 acre parcel that borders on a public road can she clear cut 25 acres along the road?

Answer: Yes, assuming the road is her boundary and she has appropriate separation zone distance and acres on the other three sides, she can create the 25 acre clearcut adjacent to the road.

21. When a utility line is to be cut through a property, who is responsible for filing the FON?

Answer: This question has two answers depending on the circumstances. In the case of a single crossing of a single landowner, whoever owns the land is responsible for filing the FON. In the case of a utility line crossing multiple landowners we will accept a FON from

the utility company and they can list themselves as the landowner. In either case it will be necessary to file a separate FON for each town involved, and the map must show the corridor.

22. Is a utility line a change of use?

Answer: Yes, and the FON should show it as such.

23. If a landowner has a utility row through his property and wishes to create a clearcut, how will the row be treated with respect to the FPA.

Answer: It will be treated as if it does not exist, just as a land management road is treated. It is neither a clearcut nor a separation zone.

24. If a category 2 or 3 clear cut is surrounded by the required 250' separation zone width but the 1:1 separation zone area is a balloon that is connected to the 250' zone by a corridor of qualifying separation zone, how wide does this corridor need to be to meet the requirements in the rules? No other surrounding land will meet separation zone requirements.

Answer: Since all separation zones must be at least 250' wide, the corridor described in the question must also be at least 250' wide. While implicit in this question, we also want to emphasize that unless the clearcut touches or approaches a boundary, the sz needs to be at least 250' wide all the way around each clearcut.

25. What procedure should a landowner follow if during the 2 year life of a notification which notifies for a partial cut, she decides to create a category 3 clearcut?

Answer: The landowner should amend the notification by sending MFS a letter which references the existing notification number, and which is accompanied by a harvest plan required of such a clearcut. Once the amendment and the plan is received and date stamped by the MFS, the clock will start on the 60 day waiting period. During the waiting period, the landowner may continue with the partial cut, but may not create the category 3 clearcut.

26. When creating a clearcut adjacent to a field, does the landowner need to leave a 250 separation zone along the edge of the field?

Answer: Yes, assuming the landowner owns the field and the field is not adjacent to boundary in such a way that the boundary exception applies. The definition of a separation zone in the rules is: "...an area that immediately surrounds a clearcut and separates it from any other clearcut. A separation zone must consist of forest land, and must meet the standards and requirements of this rule. The separation zone may include forested wetlands, and skid roads or skid trails, provided these skid roads or skid trails are not immediately adjacent to a clearcut. A separation zone does not include other non-forest areas such as non-forested wetlands, public and private roads, land management roads, winter haul roads, driveways, utility lines, development sites, pipelines or railroad rights-of-way." A field is not forest land and cannot serve as a separation zone. It is treated the same way that a land management road is treated.

27. Regarding certification of Regeneration for Category 2 & 3 clearcuts, when does the 5 year clock start?

Answer: It starts at the completion of the harvest. See section 4B of the rules.

28. How close to the edge of a clearcut, must the separation zone be?

Answer: It must be adjacent to and surround the cut. Except as otherwise exempted in the rules, if the forest growth immediately surrounding a planned clearcut does not meet separation zone standards for the category of cut being planned, the clearcut cannot be made legally.

29. Can an old clearcut that "grows up" to become separation zone quality during the life of an adjacent separation zone (it did not qualify at the time the separation zone was needed), be substituted for some of that separation zone at the time it does qualify.

Answer: Yes, as long as it meets all of the requirements of a separation zone under the new rules.

30. What is the minimum distance that is required between openings less than 5 acres?

Answer: An opening that is less than 5 acres is not a clear cut, and is not subject to the FPA rules.

31. Which of the four reasons for creating a clearcut should be used in the following cases: (1) site conversion, ie. conversion from a natural hardwood or mixedwood stand to a softwood plantation? and (2) the management objective of encouraging intolerant species that require full sunlight such as white birch?

Answer: The selection of the reason for creating a clearcut is up to the landowner and/or his or her licensed professional forester, after careful consideration of all the available options that are consistent with the landowner's objectives. Each decision will likely be based on its own unique set of circumstances, and it is not up to the MFS to make that decision for the landowner. Unless it is totally unsupportable from the standpoint of acceptable forestry practices, the MFS will accept any of the four reasons that a LPF selects, and is willing to support.

32. The rules state: "A certification, from the LPF or CWP preparing the plan, that the proposed harvest does not occur within significant or essential wildlife habitats, or if the harvest does occur within such areas, a certification that all appropriate approvals, permits, or variances have been obtained." What is the MFS expectation with regard to this requirement?

Answer: For SWH, this means that the LPF or CWP certifies (in writing, in the plan) that the harvest does not occur within SWH. It is the responsibility of the LPF or CWP to check the IF&W maps. If MFS finds out later that the harvest did occur within a SWH, it will be considered a violation. If the harvest is planned to occur within a SWH, the LPF or CWP must submit either a copy of the approved NRPA permit or the approved PBR with the plan. If the Regional Biologist is willing to send a letter concerning the issue, it would be prudent to include a copy in the plan.

For EWH, this means that the LPF or CWP certifies (in writing, in the plan) that the harvest does not occur within EWH. It is the responsibility of the LPF or CWP to check the IF&W maps. If MFS finds out later that the harvest did occur within a SWH, it will be considered a violation. If the harvest is planned to occur within a EWH, the LPF or CWP must submit a copy of the approved DIFW variance.